

# PROFESSIONAL CONDUCT COMMITTEE

## Minutes of Meeting on April 30, 2001

[Approved on May 31, 2001]

Prepared By: Terry Wood

Meeting JSI Center for Environmental Health,  
Location: Boston, MA.

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1. **Call to Order:** Co-chair Debra Stake called the meeting to 12:25 p.m. Also present were Lawrence Feldman, Kirk Franklin, Gretchen Latowsky, Debbie Phillips and Mark Roberts. Staff members present were Allan Fierce, Terry Wood, Joe DeCola, Brian Quinlan, Ed Unser and Anne Hartley. Also present were Wesley Stimpson, a member of the LSP Association; Maria Pinaud and Tom Potter of DEP.

Gail Batchelder joined the meeting at 1:18 p.m.

2. **Announcements:** None.
3. **Previous Minutes:** The draft minutes of the meeting held on March 21, 2001 were approved with one minor edit.
4. **Old Business:**

- A. **Status of Complaint Review Teams**

At Ms. Stake's request, the chair of each CRT reported on progress made during the last month. Mr. Feldman reported that he needed to be recused from 00C-008. Ms. Phillips agreed to take Mr. Feldman's place on the CRT for that case.

- B. **Discussion re: Admonition Requests**

Mr. Fierce stated that, after last month's PCC meeting, he and Ms. Wood had met with Ms. Pinaud and Lisa Alexander from DEP to discuss simplification of the admonition request process. Mr. Fierce stated that, as a result of this meeting, the group had come up with a proposal for the Committee's consideration. Mr. Fierce asked the Committee to consider the following: DEP would come up with a list of certain MCP violations that DEP staff repeatedly encounter in reviewing LSP submissions. When DEP finds these particular violations in an NOAF, it could send an admonition request to the Board. The request would be without prejudice in that DEP would reserve the right to make the entire NOAF part of a later complaint against the LSP. Mr. Fierce stated that this process could result in a targeted list of violations

considered suitable for referral.

Ms. Pinaud stated that a number of the same violations are found repeatedly during audits of LSP submissions. She handed out a list of some of these violations along with copies of some NOAFs citing the violations on the list. Ms. Pinaud pointed out that this list was not meant to be exhaustive. Ms. Pinaud went on to discuss some of these violations which included: failure to determine all applicable groundwater categories at a site; failure to outline the boundaries of the disposal site in an RAO; failure to ensure that data is scientifically valid and defensible; incorrect calculation of Exposure Point Concentrations; failure to identify hot spots; and failure to identify human receptors at the site or in the surrounding area.

Ms. Phillips stated that the letter sent to the LSP with the admonition request should make clear that DEP could later file a complaint against the LSP based on the same NOAF that is the basis of the admonition request.

Ms. Pinaud said that, in coming up this list of violations, she tried to identify violations that were both common and significant. She stated that she had chosen violations that, if addressed through admonitions, may help to raise the standard of practice in the LSP community.

Mr. Roberts stated that he thinks that another violation, namely, that a risk assessment using the Method 1 standard includes data indicating exceedances of the Method 1 standard, should be added to the list. Ms. Pinaud stated that she believes this violation to be more serious because it results in submission of an RAO without demonstration that a level of 'no significant risk' exists at a site. Mr. Roberts stated that he recalled another DEP staff member stating at a recent Board meeting that this violation is common. He added that he was concerned that nothing would be done to address this common problem if DEP was neither filing complaints nor making admonition requests based on this issue. Ms. Pinaud stated that DEP is planning to address this issue in another way.

Mr. Feldman stated that there may be room for debate regarding the relative seriousness of these violations. For example, he believes that, in certain situations, using a higher number than allowed under Method 1 might be less egregious than failing to look at GW-3 standards or consider potential human receptors. Ms. Pinaud stated that she sees a violation that relates to submission of an RAO despite the existence of data indicating exceedances of the Method 1 standards as particularly serious because, in that situation, the LSP has documentation indicating

that a level of 'no significant risk' has not been achieved.

Mr. Franklin asked the DEP staff members in attendance whether a checklist of the issues DEP looks for during an audit is available to LSPs. Mr. Potter stated that a checklist is currently available for review on DEP's Web site. Mr. Franklin asked whether it would be possible for DEP to offer a class to teach LSPs what DEP looks for during an audit. Mr. Potter stated that DEP will offer audit case-study training in the fall for both DEP staff and LSPs.

Ms. Phillips asked if the NOAFs circulated by Ms. Pinaud were intended to be formal admonition requests. Ms. Pinaud said they were not formal requests but were simply meant to spark discussion. Ms. Pinaud also stated that, when she submits formal requests, she thinks it would make more sense for her to simply circle the violations on the NOAF that are the basis of the request rather than draft a separate cover memo explaining the circumstances of the case. Ms. Phillips stated that the letter sent to the LSP with the admonition request should clearly state that only the circled violations are at issue. Mr. Feldman stated that he thought admonitions were to be issued only in cases involving obvious discrete issues. He also stated that, if the violations being referred are part of more serious problems on the part of LSPs, then perhaps the Committee should not spend a great deal of time on an admonition project.

Mr. Roberts posed the question whether the Board's issuance of an admonition regarding particular violations would have greater impact on the LSP community than the issuance of an audit report. Mr. Fierce thought that the Board's issuance of admonitions in addition to DEP actions may result in greater awareness among the LSPs. Ms. Phillips questioned the potential impact of admonitions because she views the violations outlined by Ms. Pinaud as basic and obvious mistakes that LSPs should already know to avoid.

Mr. Stimpson stated that, if the violations listed by Ms. Pinaud are the top seven issues noted in NOAFs, then the issuance of admonitions regarding these violations would affect the practice. He did point out that there is often approximately a one-year time lag between the date when an LSP submits a report and the time an NOAF is issued. He stated that, if the Board's goal with admonitions were to raise the level of practice, he would be supportive.

The Board discussed whether the list of target violations should be considered DEP's list or a joint list from both DEP and the Board. After some discussion, the consensus of the Committee was that the list should be considered to be from DEP but that the Board had agreed to

review admonition requests involving the violations on DEP's list.

Mr. Stimpson asked how the Board could issue actual admonitions during the course of a pilot program. Ms. Phillips stated that the Board is committed to issuing admonitions and the pilot is merely intended to work out the Board's process. Mr. Stimpson wondered what would happen to admonitions previously issued in the event that the Board's criteria for issuing admonitions should change. Ms. Phillips stated that she did not think the criteria would likely change and that the Board would not be limited to issuing admonitions involving the violations on DEP's list. Ms. Stake stated that the Board could look at several requests, decide upon the details of the process and then begin to send out formal admonitions. The consensus of the Committee was that it had agreed to adopt admonitions as another possible disciplinary mechanism.

Mr. Fierce asked how many admonition requests DEP would likely send the Board each month. Mr. Potter said that he thought there would likely be eight to ten per month. Mr. Fierce stated that he thought that was a good number. He added that a remaining question was how long the Board staff and the Board members would spend working on admonitions. Ms. Pinaud said she would prepare some formal requests to send to the Board.

Mr. Stimpson asked Ms. Pinaud how she came up with the specific violations on her list. Ms. Pinaud stated that the violation needed to be :1) important; 2) fairly black and white; and 3) frequent. Mr. Stimpson stated that the target list of violations should remain consistent for some period of time if admonitions are to raise the level of LSP practice. Mr. Feldman stated that he did not think it was necessary to place so much emphasis on the target list.

The Committee discussed the possibility that Mr. Fierce would write an article for the LSPA Newsletter regarding the Board's plans to issue admonitions. Mr. Feldman volunteered to write some draft language regarding the Board's current plans.

Mr. Stimpson asked whether DEP intended to submit an admonition request every time it encountered one of these violations. Ms. Pinaud said that DEP would exercise some judgment in deciding which cases to refer for an admonition.

The Committee decided that the next steps would be for Mr. Feldman to draft a description of the current status regarding the Board's plans for an admonition process, and for Ms. Pinaud and Mr. Potter to prepare some formal requests. Mr. Fierce stated that he hoped DEP could

provide 8-10 requests.

The Committee reviewed a draft of the letter from the Board to an LSP with an admonition request. Ms. Phillips stated that she thought language should be added to the draft clarifying that the NOAF that is the subject of the admonition request could later become part of a disciplinary complaint. Mr. Fierce stated that he would ask DEP to add language to that effect to the cover letter it will include with a request.

Mr. Roberts asked if DEP would refrain from seeking admonitions in cases where the overall NOAF suggests that a disciplinary complaint might be more appropriate. Ms. Pinaud stated that DEP would try to request admonitions only in cases that don't rise to the level of a complaint. Mr. Roberts also stated that the Board needed to make clear to the LSP that, in reviewing the admonition request, the Board will only look at the circled violations in the attached NOAF and not the NOAF as a whole. He is worried that, if the Board were to look at the whole NOAF, the process could get bogged down. Ms. Batchelder stated that, while it should be made clear to the LSP that the Board is looking only at the circled violations, she wants to be sure that the LSP will be able to include any pertinent information regarding the general site conditions in his/her response.

Mr. Fierce pointed out that the draft flow chart regarding the admonition process provides that one of the staff investigators would compile a history of any previous Board discipline against the LSP. He added that this disciplinary history might cause the Board to turn an admonition request into a disciplinary complaint.

The Committee discussed a draft of the letter to be sent to the LSP with an admonition request, and a draft admonition letter. Mr. Fierce stated he would circulate new edited drafts within the next week. A motion was made and seconded that, once the language of these letters had been finalized and requests had been received from DEP, the staff was authorized to send the requests out to the LSPs. The motion passed unanimously.

#### **C. Review Draft Flow Chart re: Admonition Request Review Process**

The consensus of the Committee was to table discussion of the draft flow chart until a later date.

A motion was made and seconded to stop the meeting at this point to allow the Board members to go into quasi-judicial session to address some disciplinary matters. The motion passed unanimously. The

meeting was halted at approximately 2:30 p.m.

Co-chair Debra Stake called the meeting back to order at approximately 3:32 p.m. Everyone previously in attendance was present except for Ms. Pinaud and Mr. Potter.

**5. New Business:**

**A. Editing CRT Reports**

Ms. Wood stated that some Board members had recently asked whether language in a CRT report could be altered to reflect the Board's initial decision in a disciplinary case. Ms. Wood stated that she thought that it was not appropriate to alter the language of CRT reports, with the exception of correcting minor typographical or other non-substantive errors. Mr. Fierce pointed out that the Order to Show Cause, prepared after the Board's initial decision, documents the grounds for that decision and, once the OTSC is issued, the content of the CRT report is irrelevant. The consensus of the Committee was that CRT reports would not be edited after the Board's initial decision in a disciplinary case except to correct minor typographical or other non-substantive errors.

**B. Should Recused Board Members Receive CRT Reports?**

Ms. Wood stated that the Board does not currently have a policy regarding whether Board members recused from a disciplinary case should receive a copy of the CRT report for that case. A motion was made and seconded that the Board institute a policy that any Board member recused from a case not be sent a copy of the CRT report. The motion passed unanimously.

**C. Could a Co-chair of the PCC Sign off on OTSC When the Board Chair is Recused?**

Ms. Wood stated that Ms. Commerford had asked if one of the co-chairs of the PCC could sign off for her on the Order to Show Cause in those disciplinary cases where she is recused. Both Mr. Roberts and Ms. Stake agreed that one of them would sign off for Ms. Commerford in cases where she is recused.

**D. Should Board Staff Grant Extensions to LSPs to File Written Responses to Complaints?**

Mr. Fierce stated that Board staff currently grants extensions to LSPs to file written responses to complaints for good cause shown. He asked if the Committee wanted to institute a formal policy regarding the granting of extensions. The consensus of the Committee was that extensions

should be given when circumstances warrant. A motion was made and seconded to leave the granting of extensions to the discretion of the staff. The motion passed unanimously.

**E. Potential Limits to Defense Provided by the Attorney General to Board Members**

Mr. Feldman asked if Board staff could inquire of the Attorney General's office regarding potential limits to the state's defense of state-appointed Board members. Mr. Feldman stated that he believed that the defense provided by the AG's office might not cover some situations when a Board member is sued personally. Mr. Fierce stated that he would invite someone from the Government Bureau of the Attorney General's office to come to a future Board meeting to discuss this issue.

**F. An LSP Corresponding Directly with Board Members on a CRT**

Ms. Batchelder stated that she and Ms. Phillips had recently received letters from an LSP's attorney regarding a pending complaint that they are investigating. Mr. Roberts stated that he believed such direct contact by an LSP or an LSP's representative during the course of an investigation was inappropriate. The consensus of the Committee was that a statement should be included in the initial letter sent to an LSP informing him/her that a CRT had been established to investigate his/her case to the effect that any correspondence or other contact with the Board during the course of the investigation should be through Board staff and not directly with any Board members.

6. **Future Meeting:** The Committee agreed to meet on May 31 at CERO in Worcester at 12:30 p.m. The Committee also agreed to meet on June 27 at Raytheon in Lexington, provided that Mr. Luhrs can accommodate the Committee on that day.
7. **Adjournment:** The meeting was adjourned at approximately 3:55 p.m.